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No. 364

IN THE

Supreme Court of the United States

October Term, 1951

Ralph Lemmon, Mark Lemmon and Sharon Lemmon, Co-partners trading as Lemmon Electronics,

Petitioners,

v.

Ferro Photoseal, Inc., a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1951

No. 364

Harry Lerman, Myer Lerman and Samuel Lerman,
Co-partners trading as Lerman Brothers,
Petitioners,

v.

Fruit Processors, Inc., a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI

Respondent opposes issuance of the writ of certiorari on the following grounds:

I.

Petitioners Had a Full Hearing De Novo in the District Court and Decision of the Court of Appeals Affirming the Findings of the Secretary and the District Court is Conclusive.

The first reason relied upon for reviewing the decision and findings of the three tribunals who have heard and determined this case is that the theory upon which the Circuit Court of Appeals affirmed the judgment deprived

petitioners of their constitutional right to a trial. There is no such theory in the decision of the Court of Appeals, and the petitioners had a full hearing and trial de novo.

The Perishable Agricultural Commodities Act of 1930 (7 U. S. C. A., 499), providing for an appeal from the Secretary of Agriculture to the District Court of the United States (a) provides that the appellant "shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed." (Tr. 148).

The petition for review stated the following grounds:

> (a) That the petitioners never entered into a contract for the purchase of any specified quantity of red raspberries claimed;
> (b) That the raspberries tendered were in a warehouse in Chicago and the petitioners were denied inspection for quality; and,
> (c) That the complainant did not act reasonably to mitigate damages. (Tr. 154).

In the pre-trial proceedings, these grounds of relief were reiterated and the petitioners there also contended that the contract was required to be in writing under the Statute of Frauds (Tr. 155). After the evidence was in, the District Court declared (Tr. 139):

> "The transaction is not within the statute of frauds."

As found by the Court of Appeals, "the issue of the Statute of Frauds was thus expressly eliminated by the trial court, without objection by appellants. They do not present that issue here." (Tr. 155). This is directly contrary to the false statement made by the petitioners on page 9 of the Petition that "there was, therefore, a Statute of Frauds' defense."

The Statute of Frauds had no place in the defense for the reason that aside from the memoranda of sale signed

by the joint broker, the petitioners sent respondent containers for the specially packed and frozen raspberries; they sent the rubber stamp to be placed upon the containers with their own brand of "Lerman's Frostee Brand." They had the goods specially packed for them and accepted and paid for a shipment of $16,000.00 out of a total of $31,140.00 worth of frozen red raspberries and cherries covered by the various drafts which the petitioners repeatedly promised to pay.

After the findings of the Secretary of Agriculture and the hearings before the District Court on all of the facts and after the failure of the respondent to rely upon the Statute of Frauds in its petition for review and its failure to raise the issue in the Court of Appeals, to attempt to raise the issue now in this Court proposes a serious question of the good faith of counsel and makes it perfectly clear that the first reason assigned for granting the writ is wholly specious.

The allegation of the petitioners that the Court of Appeals affirmed the award on the theory that the petitioners had violated a different parol contract, or that there was an alleged new contract, is wholly fictitious since there was but one contract and the memoranda of sale set forth the essentials thereof. This position of the petitioners is clearly an afterthought, and is within the closing language of this Court in *Helis* v. *Ward*, 308 U. S. 365, 370, 84 L. ed. 365, 371, cited for the petitioners, wherein it is said:

> "Accordingly, petitioner cannot now complain that he has not had his day in court and has been deprived of due process of law contrary to the Fifth Amendment. Due process of law is not concerned with mere afterthoughts."

Further, the petitioners declared that the "Court of Appeals, however, held that it could examine the evidence and affirm the award on the theory that the peti-

tioners had violated a different parol contract implied from the conduct of the parties." (Pe., p. 8).

The Court of Appeals did not examine the award on any theory that the petitioners had violated a different parol contract. That Court specifically declared that the sales "were all parts of one transaction" (Tr. 158); and that the memoranda of sale confirming the transaction "set forth the essentials of the contract as to the berries involved in this suit." (Tr. 160).

The Secretary of Agriculture found that the prices of the 1 and 2 lb. packages of frozen red raspberries were agreed upon. (Tr. 40). Beasley, the salesman for the joint broker, who made the agreement with Lerman, and was called to testify by Lerman, testified (Tr. p. 100-101) that these prices were agreed upon, and that the raspberries in the 1 lb. containers were one cent more per lb. than the 2 lb. containers because of the additional labor costs in packing the smaller containers. Lerman made no denial of this agreement. The District Court found that there was an agreed price for the 1 lb. and 2 lb. containers of frozen red raspberries (Tr. 50).

The Perishable Agricultural Commodities Act (Tr. 148) specifically provides "that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated." No evidence was presented by the respondent to rebut or overcome the Secretary's findings. It is idle to now assert that the Court of Appeals decided this case on any other theory than that the findings of the Secretary were correct.

We think the case cited for the petitioners, *Scott* v. *Herrell*, 27 App. D. C., 935, is clearly in point for the respondent in that the Court held that a judgment can not be affirmed upon any ground not taken at the trial. It is equally clear that it can not be reversed on a ground not taken at the trial.

II.

The Perishable Agricultural Commodities Act and the Secretary's Regulations Pursuant Thereto are Clear and Were Correctly Construed.

The next reason assigned by the petitioners for the issuance of a writ of certiorari is that the Court of Appeals erroneously construed the Perishable Agricultural Commodities Act, which Act has not been heretofore considered by this Court.

To support the proposition of an erroneous construction, the petitioners assert that a seller may not demand payment before he delivers the merchandise and collect the contract price by charging the buyer with a violation of Section 2 (2).

No such contention was made below, and the clear terms of the statute itself shows its fallacy since it provides that (p. 147): "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

> "(1) • • •
>
> "(2) For any dealer to *reject* or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold on *contracted to be bought, sold, or consigned* (italics supplied) in interstate or foreign commerce by such dealer."

If there could be any question about the interpretation of this Act, the Regulations for the Enforcement of the Perishable Agricultural Commodities Act, promulgated by the Department of Agriculture, under the terms of the Act, put the construction beyond question, in the following provision (Tr. 150):

> "(q) 'Reject without reasonable cause' means the act of any person, who has purchased or offered to handle on consignment or otherwise, for or on behalf

> of another, produce in commerce, (1) of refusing or failing to accept such produce within a reasonable time, or (2) of advising the seller or shipper or his agent that such produce will not be received in accordance with the contract or offer or (3) of indicating an intention not to accept such produce through an act or failure to act inconsistent with the contract."

These regulations of the Secretary of Agriculture, not being in conflict with the statute, but in conformity therewith, have the force and effect of law. The decisions to this effect are numerous and uniform. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, 86 L. ed. 1573; *Maryland Casualty Company* v. *United States,* 251 U. S. 342, 64 L. ed. 297.

Drafts on July 10th, July 12th and July 25th, 1946, were sent to the American Security and Trust Company with Bill of Lading attached and petitioners notified. The Court of Appeals found (p. 159):

> "Thereafter, repeated requests were made for payment of this and two earlier drafts and repeatedly appellants promised to pay the drafts, giving as reason for delay that they were temporarily short of funds. However, no payment was made. On August 6, appellants demanded inspection which was refused by appellee the following day in a telegram stating that, unnless the drafts were paid by August 7, appellee would withdraw them and sell the berries holding appellants for any loss. It was not until the pre-trial proceedings—twenty months after the order of reparation—that appellants ever questioned this provision of the contract."

It was, therefore, a clear rejection of these goods, and the authority of the Secretary of Agriculture to award reparation cannot be questioned.

III.

No Fraud of the Respondent Was Asserted in the Trial Court, But That Court Held Petitioners' Demand for Inspection Was Made in Bad Faith.

The next reason assigned for issuance of the writ of certiorari is that the Court of Appeals sanctioned what might be a fraudulent claim in that they did not sustain the petitioners' requested inspection of the frozen fruit at the warehouse in Chicago.

As heretofore shown herein from the opinion of the Court of Appeals, no inspection was demanded when the fruit was being packed. The demand was made after the fruit was frozen and was in the warehouse in Chicago, subject to the sight drafts with the Bill of Lading attached, until the respondent wired the petitioners that unless the drafts were paid by August 8th, the respondent would withdraw them and sell the berries, holding the petitioners for any loss (Tr. 159). Further than this, the District Court, who heard the testimony of petitioner Lerman, made the following statement (Tr. 141):

> "The Court holds that the claim of the right to inspect was not made by Lerman in good faith and is, in fact, an afterthought."

The District Court also held (Tr. 140):

> "Lerman claims that he had the right of inspection before making payment. If he had such right it was not by virtue of the contract, but wholly because of the Secretary's Regulation 26.24(i).
>
> "If, as claimed by Lerman, he had the right of inspection, the right existed for a reasonable time only after notice of arrival of the goods at the point of destination."

That Court further called attention to the Secretary's Regulation, Sub-section (s):

"Acceptance includes any action by a purchaser which is inconsistent with the rejection of produce."

It is further contended for the petitioners that since the statute gave them a trial de novo in the District Court, they waived none of their defenses by failing to present them to the Secretary.

The statute provides, as heretofore set out, that in their petition for review of the findings of the Secretary, they shall state prior proceedings before the Secretary and shall state the grounds upon which the petitioners rely to defeat the right of the adverse party to recover the damages claimed. There was no claim of fraud made in their petition for review, nor in any of the proceedings before the trial court. To assume or infer fraud in order to obtain the issuance of a writ of certiorari is not complimentary to counsel for the petitioners.

Finally, the case was fully heard in the District Court where the petitioners called to the witness stand every person familiar with the transaction—Elder, the general manager of the respondent; Beasley, the employee whom Dietrich sent at the request of the petitioners to the respondent to purchase these frozen fruits; Dietrich, the joint broker; and Lerman, the respondent. Every phase of the transaction was gone into—the sale and purchase, the terms, the memoranda of the joint broker, of which each party had copies, the forwarding of bills of lading with sight drafts attached as provided in the contract, notice to the purchasers of the sight drafts and repeated promises by the purchasers to pay them. There was no evidence, or fact, which was not available to the petitioners at the trial, and practically all of this evidence was adduced without objection, much of it by the petitioners themselves. To grant a writ of certiorari with the object of returning this case either to the Secretary of Agriculture, or to the lower court, where the respondent was

fully heard, would be but to take another and a fourth bite at the same raspberries and retry the issues already fully determined.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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